

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 22, 2010**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP92  
STATE OF WISCONSIN**

Cir. Ct. No. 2008TR16300

**IN COURT OF APPEALS  
DISTRICT I**

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**VILLAGE OF WHITEFISH BAY,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DAVID W. CZIRR,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Affirmed.*

¶1 KESSLER, J.<sup>1</sup> David W. Czirr appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

(OWI), first offense, contrary to WIS. STAT. § 346.63(1)(a) (2007-08).<sup>2</sup> Czirr argues that his pretrial motion to suppress should have been granted because the traffic stop was unconstitutional. We conclude that the officer had probable cause to believe Czirr had violated WIS. STAT. § 346.15 and, therefore, he was permitted to initiate the traffic stop. We affirm the judgment.

## BACKGROUND

¶2 Czirr was cited for OWI, first offense, after a traffic stop that took place in the Village of Whitefish Bay in the early morning hours of February 24, 2008.<sup>3</sup> Czirr was found guilty by the municipal court and sought *de novo* review in the trial court.<sup>4</sup>

¶3 Czirr filed a motion to suppress, contesting the constitutionality of the traffic stop. At the motion hearing, the arresting officer, Sergeant Daniel F. Courtier, testified about the circumstances that led him to pull over Czirr’s vehicle.<sup>5</sup>

¶4 Courtier testified that at about 2:25 a.m., he was on patrol when he saw Czirr’s pickup truck traveling eastbound on Hampton Avenue. Based on “the presence of the vehicle at that time in the morning in a winter night in February”

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

<sup>3</sup> Czirr was also cited for violating WIS. STAT. § 343.305(9) and (10) for refusing to submit to a chemical test of his breath. That citation is not at issue on appeal and will not be addressed.

<sup>4</sup> The municipal court proceedings are not part of the record and will not be discussed.

<sup>5</sup> The motion hearing was conducted by the Hon. Raymond E. Gieringer, Reserve Judge. Czirr was ultimately found guilty and sentenced by the Hon. Jonathan D. Watts.

when there is “basically no traffic in Whitefish Bay,” Courtier executed a u-turn and followed the truck. Courtier said that as he followed the truck, he saw it “very gradually drift towards the [ten-foot wide] median in the roadway.” Courtier continued: “As it did so, it rode up over a -- I guess you could call it an ice berm and ended up traveling on the median where there was a snowbank from snow plowing operations. After hitting the snowbank, it came back on to the traffic lane.” Courtier said that the truck traveled on the median “for a short time,” which ended when Czirr “basically corrected back into the traffic lane almost immediately after riding up on to the median.” Based on seeing the truck leave the roadway and drive on the median, Courtier initiated a traffic stop.

¶5 In addition to hearing Courtier’s testimony, the trial court viewed Courtier’s squad car’s video recording of the events leading up to the traffic stop. Courtier narrated the video for the trial court, noting that it was “difficult to see” where on the videotape the truck drove onto the median, due to the distance between the squad car and the truck. Courtier pointed out for the trial court when the truck could be seen moving left and then right.

¶6 The trial court implicitly found Courtier’s testimony to be credible. It explicitly found: “There was a deviation. There’s no doubt about that.” The trial court concluded that given the totality of the circumstances, the stop was constitutional.

¶7 Czirr ultimately pled guilty based upon a stipulated agreement of the parties.<sup>6</sup> He was ordered to pay a fine and costs and his driving privileges were revoked for six months. This appeal follows.

## DISCUSSION

¶8 At issue is whether the traffic stop violated the constitutional protections of the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. “A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred or have grounds to reasonably suspect a violation has been or will be committed.” *State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569 (citations and internal quotation marks omitted). On appeal, we review the trial court’s findings of historical fact concerning the traffic stop using the “clearly erroneous” standard, but we independently apply those historical facts to constitutional principles. *See id.*, ¶10.

¶9 Czirr argues that his truck’s “momentary touching of an ice berm intruding up to [1.5] feet into the roadway from a median does not, in and of itself, give rise to reasonable suspicion to stop the vehicle.” (Bolding and capitalization omitted.) He contends that under the totality of the circumstances, there was no reasonable suspicion to stop his vehicle.

¶10 In response, the State argues that the stop was justified on two bases: (1) the officer had probable cause to believe that Czirr had violated WIS. STAT.

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<sup>6</sup> Czirr refers to the proceedings as “a *pro forma* trial on stipulated facts,” rather than a guilty plea. This distinction does not affect our analysis.

§ 346.15,<sup>7</sup> which prohibits a vehicle from driving “over, across or within” the median; and (2) the totality of the facts supported a reasonable suspicion that Czirr was operating while intoxicated. We agree with the State’s first argument and, therefore, we do not consider the second.

¶11 Courtier testified that Czirr’s truck traveled on the median “for a short time.” Assuming the accuracy of the videotape’s time counter, it may have been for only a second, which is consistent with Courtier’s testimony that Czirr “corrected back into the traffic lane almost immediately after riding up on to the median.” This momentary travel on the median gives rise to probable cause that a violation of WIS. STAT. § 346.15 occurred. This probable cause justified the stop. *See Popke*, 317 Wis. 2d 118, ¶21 (traffic stop was reasonable where officer had probable cause to believe a traffic violation had occurred).

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<sup>7</sup> WISCONSIN STAT. § 346.15 provides:

**Driving on divided highway.** Whenever any highway has been divided into 2 roadways by an intervening unpaved or otherwise clearly indicated dividing space or by a physical barrier so constructed as to substantially impede crossing by vehicular traffic, the operator of a vehicle shall drive only to the right of such space or barrier and no operator of a vehicle shall drive over, across or within any such space or barrier except through an opening or at a crossover or intersection established by the authority in charge of the maintenance of the highway, except that the operator of a vehicle when making a left turn to or from a private driveway, alley or highway may drive across a paved dividing space or a physical barrier not so constructed as to impede crossing by vehicular traffic, unless such crossing is prohibited by signs erected by the authority in charge of the maintenance of the highway.

This statute was amended in 2009, over a year after the traffic stop in this case. *See* 2009 WISCONSIN ACT 97 § 7. However, we note that our analysis would be the same even under the revised statute, as the amended language is not relevant to the issues presented here.

¶12 Czirr does not explicitly challenge the veracity of the officer's testimony or the trial court's findings. However, in his opening brief he urges this court to review the video recording of the stop, asserting that "[a] review of the videotape will reveal that the pick-up truck did not leave the roadway, but instead, ro[de] up on the ice berm momentarily, and then immediately corrected back to the center of the lane of traffic. There was no traffic violation." Czirr also argues that it is not "proper to characterize the truck as traveling along the median, as both the videotape and Officer Courtier's testimony confirm that the second the truck's tires touched the ice berm, it immediately corrected back to the center of the narrowed lane of travel." We infer that Czirr is arguing that his truck did not actually travel on the median, or that doing so for only a second does not constitute a violation of WIS. STAT. § 346.15. We reject these arguments.

¶13 Courtier explicitly testified that Czirr's truck "ended up traveling on the median where there was a snowbank." Having viewed the videotape, we cannot say that the trial court's acceptance of this testimony was clearly erroneous. The squad car's distance from the truck and the limited quality of the videotape make it difficult to determine precisely where the truck traveled, and we cannot conclude that the video recording clearly contradicts Courtier's testimony. Courtier testified that he saw the truck travel briefly on the median and the trial court believed him. We are bound by that finding. *See Noll v. Dimiceli's Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983) (trial court acting as fact-finder is "ultimate arbiter of the credibility of the witnesses" and its findings of fact are not clearly erroneous if there is credible evidence to support them).

¶14 Next, Czirr does not specifically argue that momentarily being on top of the median cannot constitute a violation of WIS. STAT. § 346.15 as a matter of law. There is no controlling case law with respect to § 346.15, but our supreme

court's analysis of a similar traffic violation is instructive. In *Popke*, the court concluded that where the driver's vehicle briefly operated left of the center of the road, the officer had probable cause to believe that the driver had violated WIS. STAT. § 346.05 (2005-06) (prohibiting a person from driving left of center), and could, on that basis, initiate a traffic stop. See *Popke*, 317 Wis. 2d 118, ¶¶15, 17-18. Similarly, while Czirr may have only briefly traveled on the median, that act gave the officer probable cause to initiate the traffic stop.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

